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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1424

HARVEY BARRY JACOBS, M. D., *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Harvey Barry Jacobs, M. D., respectfully petitions this Court to issue a writ of certiorari to review the judgment and opinion entered in this proceeding on February 6, 1978, by the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit, dated February 6, 1978, has not been published, but is appended to this petition at page 1a. The District Court for the Eastern District of Virginia at Alexandria issued no opinion.

JURISDICTION

The petitioner, following a jury trial in the United States District Court for the Eastern District of Virginia, (Lewis, J.) was convicted, on May 5, 1977, of devising a scheme to defraud the government, and of using the mails in furtherance of such a scheme in violation of 18 U.S.C. § 1341 and 2.

On February 6, 1978, the Court of Appeals for the Fourth Circuit issued its unpublished opinion affirming the conviction.

On March 29, 1978, the Court of Appeals denied petitioner's application for a Petition for Rehearing and Suggestion for Rehearing En Banc, and this petition is being filed within thirty (30) days after entry of that judgment.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

1. Whether the due process clause of the Fifth Amendment and 18 U.S.C. § 1341 and 2 permit a conviction for devising a scheme to defraud the government, and of using the mails in furtherance of such a scheme, when the actions upon which the conviction is based were in strict compliance with, and specifically authorized by law.

2. Whether the confrontation clause of the Sixth Amendment requires exclusion of hearsay statements allegedly made by one charged as a coschemer under 18 U.S.C. § 1341 where such statements are crucial and devastating to the defense and the coschemer is shown to be untrustworthy.

3. Whether a conviction under 18 U.S.C. § 1341 and 2 may be based mainly upon the introduction of unreliable hearsay, in violation of the proof aliunde rule.

4. Whether the failure of the trial judge to allow petitioner to put on a proper defense to the charges against him violated his due process rights under the Fifth Amendment and his right to a proper and fair trial under the Sixth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Code, Title 18, Section 2:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

United States Code, Title 18, Section 1341:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimidated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

A. The Indictment

The December 1976 term of the Grand Jury sitting in Alexandria, Virginia, returned a seven count indictment against petitioner, Harvey Barry Jacobs, M. D., and two other persons who are still fugitives from justice, charging violation of 18 U.S.C. § 2, 287, 371 and 1341. (See IA-9 *et seq.*).[1] After defendant filed numerous motions to discuss certain counts of the indictment, the government decided to cure the defects of the first indictment by reindicting Dr. Jacobs, which it did during the January 1977 term of the Grand Jury (See IA-29). Once again defendant sought by motion to sever certain counts from the indictment and have other counts dismissed. On the eve of trial the government scuttled the entire first two indictments, dismissing all charges against Dr. Jacobs, and decided to replace them with a third indictment. The instant ten count mail fraud indictment, charging only violations of 18 U.S.C. § 1341 and 2, was handed down during the February 1977 term of the Grand Jury (See IA-53 *et. seq.*, and generally See IA-1).

This ten count indictment was reduced pursuant to an order of the trial court to five counts. (See IA-114.) The indictment generally charges Dr. Jacobs with violations of 18 U.S.C. § 1341 and 2 by devising a scheme, in cooperation with Victor Salerno and James K. Sawici of Metropolitan Diagnostic Laboratory, a now defunct medical laboratory, to defraud, by use of the mails, Medicaid and Medicare, in connection with billings for medical laboratory testing. The heart of the indictment is contained in paragraph C, D, and E of each count which allege that it was part of the scheme for Dr. Jacobs to submit claims to Medicare and Medicaid for tests allegedly performed by, or through, the Metropolitan Diagnostic Lab but which were actually

[1] Hereafter, page references are to the joint appendix filed in the Fourth Circuit. Thus IA-9 refers to joint Appendix, Part I, Page 9.

not done, and that further it was part of the scheme for the petitioner to submit claims for laboratory testing allegedly done on an individual basis, but which were actually done by less expensive "battery" or "group" methods using a SMA-12 machine. (See IA-54.)

The first trial of petitioner ended in a hung jury and mistrial. Retrial was conducted on May 2, 1977. At the close of all the evidence, the five counts upon which petitioner was tried were compressed by the court into one count, that is, if the jury decided that it could return a verdict of guilty with respect to any one or more of the five counts, the jury would go no further and return only one verdict of guilty without indicating which of the five mailings form a basis for the verdict. After a two and one-half day trial the jury returned a verdict of guilty.

B. The Claims of the Government and Petitioner

At petitioner's second trial, there was a stipulation entered into by petitioner and the government which narrowed the issues to be tried to:

(a) Whether the petitioner devised and intended to devise a scheme to defraud by allowing and creating a billing system which would submit bills to Medicaid and Medicare for laboratory tests which were not performed and for which the laboratory submitted phoney and false tests results, and

(b) Whether the petitioner devised and intended to devise a scheme to defraud by knowingly and willfully billing as individual test procedures testing that was performed as part of the single procedure on the SMA-12 machine.

Paragraph (a) of the Stipulation concerned allegations that numerous tests were ordered by Dr. Jacobs but not performed and for which results were supplied anyway. (IA-54.) There were six stipulated tests which could not be performed at the Metropolitan Diagnostic Lab. It was undisputed that these six types of tests were to be referred to the Washington Hospital Center Laboratory, at which the Metropolitan Diagnostic Lab's resident pathologist was an employee. It was the government's contention that many of these tests were never in fact referred to the Hospital Center but that with Jacob's knowledge, phony results were supplied and the samples themselves dumped. It was Dr. Jacobs' position that, to his knowledge, the tests were referred by and the results supplied to the doctors at the clinics and were medically consistent with the ills of the patients.

Paragraph (b) of the Stipulation dealt with the manner in which Dr. Jacobs billed for certain chemistry tests. These tests were capable of being performed in two ways. One manner was by use of a machine called an SMA-12 or CHEM-12 which essentially accepted a blood sample in one end and kicked out twelve chemistry results from the other end. The other manner of performing these tests was individually by hand, or by certain machines designed to do the specific chemistry tests individually. Dr. Jacobs' consistent practice was to order chemistry tests individually, to receive only those specific chemistry tests ordered and in turn to bill Medicaid and Medicare on an individual basis. The government contends that tests were run as a panel on an SMA-12 machine and that they should have been billed out at a lesser group rate rather than an individual test rate. It was petitioner's contention that

under the appropriate regulations he could order the tests on an individual basis and could bill accordingly, regardless of how the tests were run. A motion prior to both trials advanced that such billings were lawful under the regulations and that accordingly such billing could not constitute fraud. For this reason, it was moved that the case as to SMA-12 testing be dismissed. (See Motion to Dismiss for Lack of Due Process (IA-62.) The motion was denied. Similarly, at the appropriate times in both trials, motions were made to dismiss that aspect of the case on the grounds that such billing was lawful and not capable of being fraudulent. (See Motion for New Trial or in the Alternative Motion for Judgment of Acquittal, IA-128, and as well, motion in open court for judgment of acquittal, III A-438, 609.) The language of the indictment covered by this allegation of the alleged scheme is contained in paragraph E of the indictment.

Petitioner's defense to the indictment was that:

(a) Dr. Jacobs could not possibly be guilty of defrauding the government in his billings of individual test procedures actually performed as a "battery" on an SMA-12 machine because the applicable HEW regulations specifically authorized this type of billing procedure;

(b) Dr. Jacobs had no intention of defrauding the government by his billing of individual test procedures and, in fact, that it was Dr. Jacobs "good faith" understanding that such billings were perfectly proper, legal and in harmony with the procedures recommended by the applicable regulations of the Department of Health, Education and Welfare (HEW); and further that

(c) Dr. Jacobs took no part in, nor had any knowledge of, the Metropolitan Diagnostic Lab's nonperformance of laboratory tests and submission of phony and false tests results.

C. The Evidence at Trial

1. Petitioner's SMA-12 Billing Procedure

The government offered evidence at trial that petitioner developed a billing system whereby he would request individual test results of samples submitted to the Metropolitan Diagnostic Lab and received back from the laboratory individual test results knowing full well that the actual testing was being performed by an automated procedure, the SMA-12 machine. According to the government's theory of the case, the so-called fraud arose when petitioner submitted bills to Medicare and Medicaid as if the tests had been performed individually rather than as a battery with the *knowledge* the testing had been performed on the automated equipment. Government witnesses testified at trial that it was improper to bill at the individual test rate when, in fact, the tests were performed as part of a battery. In May of 1977 when these government witnesses testified it was, in fact, improper to bill individually for tests that were actually performed on the SMA-12 machine. However, the allegations in the indictment referred to petitioner's billing practices during the years 1974 and 1975. During the years 1974 and 1975, HEW regulations specifically provided that a physician who performed or had performed for him laboratory tests as part of a battery could receive reimbursement for that battery as if the tests had been performed individually.[3]

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[3] The applicable regulations are discussed in greater detail *infra*.

Petitioner attempted numerous times throughout the trial to introduce evidence concerning HEW regulations in effect during the years 1973-1975. The regulations were of paramount importance to petitioner's defense because they provided that a physician was entitled to reimbursement at the individual testing rates irrespective of any knowledge of or *how* the tests were actually performed. The trial court absolutely refused to allow any evidence concerning the regulations. The trial court at one point made the following comment in this regard.

> [There is] no charge against the doctor that he did not follow the regulations in filing the bills. He is not charged with not filing them. He is charged with knowingly submitting and what he knows to be a false or phony bill. It has nothing to do with the regulations. Now I've reiterated that so many times and I want you to bear in mind that this is not the charge in this case. *Whether he followed the regulations technically speaking is immaterial.* (emphasis supplied) (III A-155-156.)

The trial court was of the view that whether or not petitioner followed HEW regulations had no bearing on this case and sent the case to the jury as if there were no regulations. The trial court believed and so instructed the jury that if Dr. Jacobs knew the tests were being performed as a battery but billed them individually he should be convicted of the SMA-12 related counts. The petitioner never denied that he knew that the tests he ordered were being performed by automated equipment nor did he deny that he sought reimbursement from HEW at individual rates. However, in his testimony at trial petitioner steadfastly maintained that his billing practices conformed to the pattern and practice in the profession and HEW regulations and at the very least, he was in "good faith" compliance with these regulations.

2. HEARSAY

The second prong of the government's case, that petitioner knew Salerno was throwing out blood samples and supplying false blood test results, was based almost entirely upon highly unreliable hearsay statements.

In an effort to prove that Dr. Jacobs knew the Metropolitan Diagnostic Lab was not doing tests that had been ordered and that "sink testing" for the disposal of blood was being conducted at the lab, the government called two witnesses, one of whom was a lab employee. These were the only two witneses in the entire trial in which close to thirty (30) witnesses were called that even alleged any direct knowledge on the part of Dr. Jacobs that the Metropolitan Diagnostic Lab was "sink testing." One of the witnesses was at a social occasion when she heard Mr. Salerno state that blood was being thrown out at the laboratory. (III A-116, 121.) [3] The second witness, a Metropolitan Diagnostic Laboratory employee, testified that Mr. Salerno told her that Dr. Jacobs knew about the "sink testing" and that she need not be concerned about it. (III A-311.)

There was testimony at trial that Salerno was a forger and that petitioner was a victim of those forgeries. The laboratory employee who testified that Salerno told her Dr. Jacobs knew about the "sink testing" described Salerno as the most untrustworthy person she had ever met and the government made no attempt to bolster Salerno's obvious lack of credibility.

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[3] It is unclear whether Salerno was referring to blood that had already been tested or blood that had not been tested. (III A-123.) In addition, the reliability of this statement is questioned by the fact that three other witnesses who were present did not corroborate the testimony.

REASONS FOR GRANTING THE WRIT

1. A Serious Due Process Problem Was Created When Petitioner Was Convicted Under 18 U.S.C. § 1341 for Practices Carried Out in "Good Faith" and in Compliance With Federal Regulations.

As already set out above, the trial court denied various defense motions to dismiss the SMA-12 allegations even though the government regulations authorized the SMA-12 billing procedures and reimbursement rates used by Dr. Jacobs. The Court also denied petitioner an opportunity to introduce evidence which would have shown that Dr. Jacobs billing practices with respect to SMA-12 testing was in strict compliance with, and specifically authorized by HEW regulations. In addition to using this evidence to show that Dr. Jacobs relied on these HEW regulations to reach his "good faith" conclusion that his billing practices were proper; "good faith" being an absolute defense to the crime of mail fraud, see, e.g. *United States* v. *Diamond,* 430 F 2d 688, 695 (5th Cir. 1970) and cases cited therein; petitioner sought to show that his billing practices were perfectly legal, and therefore there could be no underlying fraud capable of being part of a fraudulent scheme. It is these factors which give rise to a blatant lack of due process. See *Wright* v. *Georgia,* 373 U.S. 284 (1963).

The laboratory charges for the SMA-12 tests were billed to Medicare under what is commonly known as Part B professional services. Title 42 U.S.C. § 1395 (l) authorizes reimbursement in full of the "reasonable charges" for compensable Part B services. The amount of benefits and the determination of the proper "reasonable charge" is a matter that Congress has left to agency expertise. *St. Louis University* v. *Blue Cross*

Hospital Services, 537 F 2d 283, 290 (8th Cir: 1976). The implementing HEW regulations appear at 20 C.F.R. § 405, 480 and are amplified in detail in the Intermediary Manual. Section 6712.2 of the Part B Intermediary Manual states:

> Physicians or other persons who perform uniform series of tests and examinations or common combinations of procedures may, of course, itemize the individual components of these services on their bills if they wish and make separate charges for them. When this occurs a separate reasonable charge determination for each item is necessary.

By Memorandum dated December 23, 1975, the Social Security Administration wrote that the insurance carriers were not "strictly adhering to this guideline" because they were attempting to "cut back to the reasonable charge of that battery" when "tests that are known to be part of a battery are furnished and billed individually." In describing the problem the Social Security Administration stated:

> It is the carriers contention that it is not reasonable to allow reimbursement for a group of individual tests at perhaps $60 when the battery could be performed for around $10. (Please note that the carriers have instituted this procedure independently without instructions from the RO.) We agree in principle with this policy. But are the carriers properly interpreting Social Security Administration guidelines?

In response to their own question, the Social Security Administration found no manual reference to support the carriers' stance, and further, that *"there even appears to be contraindication of this policy."* (Emphasis supplied)

(V A-27.) It is apparent that the Social Security Administration read their own guidelines as specifically authorizing the individual billing of lab tests performed as a battery including tests performed by the physicians themselves. Of course, if a physician performed a battery test in his own office with some automated equipment, he could bill for those tests individually and the fact that he knew the tests were performed as a battery would not, according to the Department guidelines, affect his right to compensation for the testing on an individual basis.[4]

A conviction under 18 U.S.C. § 1341 requires a showing of a scheme to defraud. *Pereira* v. *United States,* 347 U.S. 1, 8 (1954). A scheme is an inchoate offense, the essence of which is a plan to do an unlawful act. *Iannelli* v. *United States,* 420 U.S. 770, 777 (1975). It is self evident that one may not devise a scheme to defraud when the scheme does not encompass any illegal act or purpose. How could Dr. Jacobs be convicted of devising a scheme to defraud the Department of Health, Education and Welfare by submitting claims at rates which the Agency itself had authorized, and expected would be used by doctors seeking payment for laboratory testing?

To permit the conviction of petitioner to stand would compel the intolerable result of sustaining a federal criminal conviction although no offense had been committed against the United States. Therefore, this Court, in the exercise of its supervisory power over lower federal courts, should not hesitate to correct the inherent unfairness of petitioner's conviction. See e.g. *Marshall* v. *United States,* 360 U.S. 310 (1958), *United States* v. *Hale,* 422 U.S. 171 (1974).

[4] The government contends that the regulations relied on by Petitioner concern only Medicare and not Medicaid billings. Because the trial court's evidentiary rulings on the regulations, the matter was never clarified.

2. Petitioner's Conviction Is Based Upon the Crucial and Unreliable, Out of Court Hearsay Statements Of An Alleged Coschemer In Plain Violation of the Sixth Amendment's Confrontation Clause.

The Sixth Amendment to the United States Constitution guaranteed to petitioner." . . . the right . . . to be confronted with the witnesses against him." *U.S. Constitution, Amendment VI.* "The right to confrontation . . . includes both the opportunity to cross examine and the occasion for the jury to weigh the demeanor of the witness" *Barber* v. *Page,* 390 U.S. 719, 725 (1968); *Pointer* v. *Texas,* 380 U.S. 400 (1965).

This Court's past opinions on the confrontation clause have created an air of uncertainty about the mission of the clause. Initially, the Court seemed to be saying that the confrontation clause requires that the defendant be allowed to cross-examine virtually all witnesses and testimony against him. For example, see *Douglas* v. *Alabama,* 380 U.S. 415 (1965) and *California* v. *Green,* 399 U.S. 149 (1970). The denial of the defendant's right to cross-examine was held to be "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it!" *Brookhart* v. *Janis,* 384 U.S. 1, 3 (1966). But then the Court seemed to change the standard by holding that the Sixth Amendment permitted the use of a hearsay statement under the coconspirator exception to the hearsay rule where the statement was reliable and neither crucial nor devastating to the defendant's case. *Dutton* v. *Evans,* 400 U.S. 74 (1970); *Mancusi* v. *Stubs,* 408 U.S. 204 (1972). Later cases of this Court

seem to return to the importance of cross-examination as a means of securing the rights of confrontation. See *Chambers* v. *Mississippi,* 410 U.S. 284 (1973) and *Davis* v. *Alaska,* 415 U.S. 308 (1974).

Salerno as a fugitive was unavailable at trial. He allegedly stated that petitioner was aware of the "sink testing." In the context of this case the term "sink testing" meant that blood samples were being sent to the Metro Lab without being tested, but the laboratory would nevertheless supply results to petitioner and petitioner would submit claims to Medicare and Medicaid for the tests. The hearsay declarations suggested that Dr. Jacobs knew of the "sink testing" and his knowledge of this practice is the crucial element of the offense that petitioner submitted bills for false and phony tests. If the jury believed petitioner was aware of this practice, they must have felt a sense of outrage. The only evidence from which the jury could have reasonably inferred that petitioner knew of and accepted the "sink testing" was Salerno's hearsay declarations. The government has never suggested the statements of Salerno were offered for any purpose other than the truth of the matters contained therein. If the jury believed the hearsay statements were true, petitioner's conviction was assured. Salerno's statements were, therefore, crucial and devastating to petitioner's case. The statements were highly unreliable in that they were self serving statements which tended to take the responsibility for the questionable laboratory practices off of Salerno's shoulders and onto Dr. Jacobs'. Salerno was shown to be totally untrustworthy, yet petitioner could not test the truth of Salerno's statements under the fire of cross-examination, either at trial, or at any other time. The admission of Salerno's incredible statements is a plain affront to the confrontation clause.[5]

Petitioner suggests the instant case is a perfect vehicle for this Court to finally spell out once and for all the mission of the confrontation clause. The hearsay declarations in question were admitted under the co-conspirator exception to the hearsay rule in plain violation of every confrontation clause opinion announced by this Court. The Court has yet to clarify the relationship, alluded to in *Dutton, supra,* between the federal conspiracy exception to the hearsay rule and the rights guaranteed by the Sixth Amendment confrontation clause. The present case offers an opportunity to resolve this existing constitutional dilemma.

3. Important Problems Are Raised When Petitioner's Conviction Is Based Mainly Upon Hearsay Statements In Violation of the Proof Aliunde Rule.

In order to sustain petitioner's conviction for mail fraud under 18 U.S.C. § 1341, the prosecutor had to show Dr. Jacobs' specific intent to commit the crime charged. Specific intent could not be proved without a showing that Dr. Jacobs knew of the improper acts of Metropolitan Diagnostic Lab. To prove Dr. Jacobs' knoweldge that Salerno was "sink testing," or not doing blood tests ordered by Dr. Jacobs, the government relied uopn the unreliable out of court, hearsay statements of Salerno referred to above. There was no other probative evidence to show that Dr. Jacobs knew Salerno was "sink testing." It is self evident

[5] At trial, petitioner testified Salerno had forged several documents and attempted to call a handwriting expert to corroborate this testimony. The trial court would not allow the handwriting expert to testify.

that the introduction of these hearsay statements was highly prejudicial to petitioner, and if admitted in error, would not constitute harmless error. *Harrington* v. *California,* 395 U.S. 250 (1969), and *Chapman* v. *California,* 386 U.S. 18 (1967).

A mail fraud scheme is much like a conspiracy in that rules of evidence regarding hearsay statements of alleged coconspirators likewise govern with respect to alleged coschemers. *United States* v. *Grow,* 394 F 2d 182,203 (4th Cir: 1968).[6] In effectuating the coconspirator exception to the hearsay rule, the Courts of Appeals in the federal court system apply the proof aliunde rule to prevent a conspirator or schemer from being convicted solely on the basis of the hearsay statements of his coconspirators. The proof aliunde rule requires that hearsay statements of coconspirators or coschemers not be considered as evidence of the conspiracy or scheme unless there is other evidence independent of such statements as to the existence of a scheme. *United States* v. *Grow, supra; United States* v. *Nixon,* 418 U.S. 683, 701 (1974).

The proof aliunde rule should have precluded the admission into evidence of Salerno's hearsay statements since there was little other evidence of a scheme on Dr. Jacobs' part. However, the trial court below, by a misapplication of the rule, actually applied the exact opposite of the proof aliunde rule. The judge allowed the introduction of the hearsay statements of a coschemer, Salerno, as the only probative evidence to prove the existence of a scheme. This is exactly what the proof aliunde rule was designed to prevent. It is

[6] Does the federal conspiracy trial exception to the hearsay rule collapse when the statements sought to be admitted are unreliable and crucial or devestating to defendant's case? *Dutton, supra.*

understandable that the judge could have misapplied the rule since there is considerable conflict in the lower courts, and in the Circuit Courts on the standards to be used in applying the rule.

The First, Eighth, and Ninth Circuits have adopted the "prima facie" test which states that the hearsay statements of coconspirators are admissible when there is sufficient other evidence to establish a prima facie case of the existence of a scheme or conspiracy. *United States* v. *Johnson,* 467 F 2d 804, 807 (1st Cir: 1972), *Rizzo* v. *United States,* 304 F. 2d 810, 826 (8th Cir: 1962), and *Carbo* v. *United States,* 314 F 2d 718, 737 (9th Cir: 1963). The Fifth Circuit seems to have adopted this test as well as some others. See *United States* v. *Oliva,* 497 F 2d 130, 133 (5th Cir: 1974). The Second Circuit has rejected the "prima facie" test and has instead looked to see if the defendant's participation is shown by "a fair preponderance of the evidence . . ." *United States* v. *Geaney,* 417 F 2d 1116, 1120 (2nd Cir: 1969). The Tenth Circuit conditions admissibility of proof aluinde statements upon "proof of circumstances from which the existence of the conspiracy fairly may be inferred . . ." *Bartlett* v. *United States,* 166 F. 2d 920, 925 (10th Cir: 1948). The Fourth Circuit seems to only require that the evidence be independent from the hearsay. *United States* v. *Grow, supra,* at 203.

The admission of Salerno's hearsay statement is a direct result of the vague and confusing standards among the Circuits. Where such an important federal evidentiary rule lacks clarity, this Court, through the exercise of its supervisory power over federal courts, should provide guidance to the lower courts. There is now a vacuum in this area which should be filled by a proper decision of this Court.

4. Important Problems Are Created By the Trial Court's Actions In Not Allowing Petitioner To Put On A Proper Defense, In Violation of the Fifth and Sixth Amendment Rights To Due Process of Law and A Fair and Proper Trial.

From the opening minutes of the trial, it became apparent that petitioner would be unfairly restricted in his defense by the trial judge. Not only did the trial court exclude evidence of Salerno's forgeries and the interpretation of the regulations by other laboratories in the community, but also refused to allow any testimony regarding the applicable HEW regulations for any purpose whatsoever, including petitioner's "good faith" defense, ruling that it was not relevant to the inquiry of Jacobs' criminal intent nor to the legality of his actions. Because this evidence was the mainstay of petitioner's SMA-12 defense, counsel attempted to get this testimony in the record through various methods and witnesses, but was cut off each time by the trial court.

In *Washington* v. *Texas,* 388 U.S. 14, 19 (1967) this Court said:

> The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies . . . This right is a fundamental element of due process of law.

See also *Webb* v. *Texas,* 409 U.S. 95 (1972).

This fundamental right of petitioner to present a proper defense has been denied to him by the trial courts evidentiary rulings. Petitioner's attempts to show that his actions were in fact lawful and proper; that he had acted in good faith, without the specific

intent required by 18 U.S.C. § 1341, in reliance upon applicable HEW regulations, the pattern and practice in the laboratory industry, and the practices and advise of other doctors and laboratories in the geographical area; were all cut off by the trial court.

A defendant's right to a jury trial is meaningless if he is not allowed to present his defenses to the charges leveled at him. Such a trial is a mere pretense to unlawfully deprive the defendant of his liberty and property without due process of law. This Court has never sanctioned such constitutional infirmities and should not do so now.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

April 6, 1978

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-2002
CR 76-291-A

UNITED STATES OF AMERICA, *Appellee,*

v.

HARVEY BARRY JACOBS, *Appellant.*

[Unpublished, Filed—February 7, 1978]

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, District Judge.

Argued: December 5, 1977 Decided: February 6, 1978

Before BUTZNER and RUSSELL, Circuit Judges, and FIELD, Senior Circuit Judge.

John D. Grad (Philip J. Hirschkop, Hirschkop and Grad on brief) for Appellant; Frank W. Dunham, Jr., Assistant United States Attorney (William B. Cummings, United States Attorney on brief) for Appellee.

PER CURIAM:

After a jury trial on charges of devising a scheme to submit "bills to Medicaid and Medicare for laboratory tests which were not performed and for which the laboratory submitted phony and false test results" and of using

the mails in furtherance of such scheme, the defendant was found guilty and sentenced to two years imprisonment. This appeal followed.

By this appeal, the defendant charges a number of errors by the district court. We find none of them of merit. The attack on the indictment as vague clearly lacks substance. The indictment gave specific details of the scheme charged and adequately apprised the defendant of the charges against him. No more was required. The defendant's defense on the merits, on the other hand, was basically that the regulations of the Department were confusing and that he attempted in good faith to comply with such regulations as they were generally understood and followed by other physicians. There was, however, ample evidence that the defendant was not intending to follow general practice in his billings to the Department but had devised a plan to defraud the Department by submitting fraudulently inflated billings of medical tests. Such evidence was clearly sufficient to make defendant's guilt a jury question. So far as the district court's rulings on evidence and its jury instructions, we find no error. The judgment of the district court is accordingly

AFFIRMED.

Supreme Court, U. S.
FILED
MAY 23 1978
MICHAEL RODAK, JR., CLERK

No. 77-1424

In the Supreme Court of the United States

OCTOBER TERM, 1977

HARVEY BARRY JACOBS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

JOHN C. KEENEY,
Acting Assistant Attorney General,

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OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1978. A petition for rehearing was denied on March 29, 1978. The petition for a writ of certiorari was filed on April 6, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether government regulations excused petitioner's conduct in billing Medicaid and Medicare for laboratory tests which had not been performed in the manner represented.

2. Whether government regulations and practices of other laboratories were properly excluded from evidence.

3. Whether extrajudicial statements of a fugitive co-defendant were properly admitted into evidence.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of mail fraud in violation of 18 U.S.C. 1341.[1] He was sentenced to two years' imprisonment. The court of appeals affirmed *per curiam* (Pet. App.).

1. The evidence showed a scheme by petitioner, a practicing physician, and fugitive co-defendants Victor H. Salerno and James K. Sawicki to defraud Medicare and Medicaid in two respects—by submitting claims for individual medical tests which in fact had been performed by means of a less expensive profile or battery testing procedure, and by submitting claims for tests which in fact had never been performed. The tests were performed (or were purported to have been performed) at the Metropolitan Diagnostic Laboratory, operated by Salerno, in which petitioner, who was at one time secretary of the laboratory corporation (Tr. 453), had an ownership interest (Tr. 99-100, 111, 121, 174-175, 246, 378).

[1]Petitioner was charged with ten counts of mail fraud, but the court required the government to select five for trial. The case was submitted to the jury with instructions that, if it decided that it could return a verdict of guilty with respect to any one or more of the five counts, it should return a single verdict without indicating which of the five mailings formed the basis thereof. This procedure—which had the effect of limiting petitioner's potential punishment to the maximum provided by a one count conviction—was suggested by the court during a prior trial which had resulted in jury disagreement and a mistrial (see Tr. 722-725 of the first trial) and was adopted on petitioner's motion over the objection of the government (see *id.* at 770-775).

Petitioner procured a loan to provide working capital for the laboratory (Tr. 98-100), endorsed and guaranteed the loan (Tr. 98), and recruited a pathologist for the laboratory (Tr. 174-175) and, thereafter, his replacement (Tr. 444-445). Petitioner also guaranteed the laboratory's lease on the profile testing machine (Tr. 60) and attempted to obtain money from Dr. DeMeo, an associate at his clinic, for leasing the machine (Tr. 115); he subsequently claimed to own an interest in the machine (Tr. 472). At a meeting at Dr. DeMeo's house, petitioner and Salerno explained that the machine would be used to "rip off" Medicare and Medicaid by making tests on it but billing those organizations for individual tests, a procedure which would yield a "1000 percent" profit (Tr. 78, 115-116, 379-380, 596). When Dr. DeMeo protested that such a procedure would be a fraud, petitioner's response was a "sardonic grin" (Tr. 380).

Petitioner and Salerno devised (Tr. 79-80) a laboratory order sheet to be used by petitioner's clinic (GX 37A). The order sheet had no place on it for ordering profile or battery tests, and it listed tests that the laboratory could not in fact perform. This order sheet was never shown to the pathologist whom petitioner had recruited for the laboratory. The pathologist was shown only the order sheet (GX 37B) used by other doctors availing themselves of the laboratory's services, which had a place for ordering profile tests and which listed only tests which the laboratory could perform (Tr. 180-183). Although petitioner testified that, for medical and malpractice reasons, he did not want battery tests performed for his patients (Tr. 500-501), in fact he knew that the laboratory was testing specimens that he sent it on the machine (Tr. 210). He was billed by the laboratory at the lower profile testing rate (Tr. 212-213, 289), and at first he was sent results on the teletype sheets which the machine printed.

Subsequently, the printed teletype results were transcribed onto individual reports for him; Salerno told the laboratory supervisor that this was done because petitioner did not want the printed teletype reports to appear on patient's charts in case there was an investigation (Tr. 311).

Petitioner was queried by the state Medicare agent as to whether tests for which claims were made were profile or individual tests (Tr. 158-159) and wrote in reply that he had ordered individual tests because he did not believe in mass profile screenings (Tr. 162-163). When personally interviewed by state health department and state Medicare investigators concerning claims he had filed, petitioner stated that his tests were ordered and made individually, and that he did not know if the laboratory even had a machine for making profile tests (Tr. 419-422). In the course of the interview, he tried to hide first his interest, and then the extent of his interest, in the laboratory (Tr. 420-421).

2. In many instances, specimens sent by petitioner were simply thrown away, and totally spurious test results were sent to him. This practice was indulged in only for petitioner's clinic patients and not for the patients of doctors not associated with his clinic (Tr. 285-287, 371-372). Salerno told a number of laboratory employees that petitioner was aware of the practice (Tr. 286-287, 313, 373). The woman who lived with Dr. DeMeo as his wife heard petitioner and Salerno discussing throwing away specimens (Tr. 112), and Salerno, in petitioner's presence, told her that they would bill for tests that would not be performed (Tr. 116). At one point, the laboratory pathologist told petitioner that he believed that tests were not being performed, and petitioner replied that he would talk to Salerno about it. Thereafter, petitioner called the

pathologist and stated that he was satisfied and happy with Salerno's work and trusted him (Tr. 184-185). There was other evidence that petitioner knew that he was getting results for tests which had not been performed: in many instances he had not sent in specimens even after being told that no specimens had been received; he was told that the laboratory did not have the tools to perform tests that he had ordered; he rarely sent enough blood for the performance of tests; he ordered more tests than could be performed on the amount of blood that could safely be drawn from a patient; and he ordered repetitive tests when results were normal without questioning their normalcy or otherwise caring what the results were (Tr. 247-251, 261-262, 285-286, 317-318, 331-332).

ARGUMENT

1. There is no merit to petitioner's contention that Department of Health, Education and Welfare regulations specifically permitted doctors to be paid for less expensive battery tests as if they were more expensive individual tests. The regulation which he cites (Pet. 13; see also J.A. V A22-A27) merely permits the doctor in billing to break down the total charge into individual components,[2] and the memorandum is concerned with the

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[2]The regulation in question (see Pet. 13) provides:

> Physicians or other persons who perform uniform series of tests and examinations or common combinations of procedures may, of course, itemize the individual components of these services on their bills if they wish and make separate charges for them. When this occurs a separate reasonable charge determination for each item is necessary.

The various memoranda which petitioner sought to offer into evidence (see J.A. V A23-A27) were concerned with the conformity to HEW regulations of the insurance carriers' policy of limiting payments to the battery or group rate in cases in which doctors ordered and received individual tests.

entirely different question of whether payments could be made on an individual basis for tests which were performed individually but *could have been* performed by the less expensive battery method. Indeed, the quoted memorandum endorses the principle "that it is not reasonable to allow reimbursement for a group of individual tests at perhaps $60 when the battery could be performed for around $10." There was, in short, ample evidence that petitioner "had devised a plan to defraud the Department by submitting fraudulently inflated billings of medical tests" (Pet. App. 2a).

2. Petitioner has no valid basis for complaining that he was precluded from offering the regulations and the practices of other laboratories to support a "good faith" defense (see Pet. 20-21). Petitioner's testimony and defense was that he had ordered, and so far as he knew received, individual test results (see Tr. 500-501); he nowhere testified that he had made claims on the basis of individual tests although ordering and receiving battery tests because he believed in good faith the regulations allowed him to do so.[3] The regulations and the practices of other laboratories were therefore immaterial. It would, of course, have been no defense that other laboratories also engaged in fraudulent practices. Cf. *United States* v. *Caldwell*, 544 F. 2d 691, 696 (C.A. 4).

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[3]Significantly, petitioner did not move the admission of the regulations in connection with his own testimony, and did not testify concerning his understanding of their provisions. He first sought to bring the regulations into the case during cross-examination of the state health department investigator (Tr. 430), and the court cut off questioning at that time, stating: "Let's get to it when we get to it" (Tr. 431). He then sought admission of the regulations through an official of the state Medicare agent (Tr. 556-560), after his own testimony was completed.

3. Salerno's hearsay statements that petitioner was aware that test results were being sent for specimens which were not actually tested were properly received in evidence. Even under the most stringent test, hearsay declarations of co-conspirators in furtherance of a conspiracy may be admitted if the independent evidence of the conspiracy is enough to take the question to the jury. Here there was clearly substantial independent evidence that petitioner and Salerno were engaged in a conspiracy to defraud Medicare. The testimony of Dr. DeMeo's "wife" and the pathologist, as well as petitioner's practices in regard to ordering tests (the insufficiency or lack of specimens, the number and repetitiveness of the tests ordered, and petitioner's unconcern with the results) and the fact that spurious test results were sent only in respect to petitioner's clinic patients, independently showed that the fraudulent conspiracy included making claims for tests that were never performed.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1978.

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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1424

HARVEY BARRY JACOBS, M.D.,
Petitioner

v.

UNITED STATES OF AMERICA

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The Government's Brief In Opposition presents an inaccurate and distorted statement of the facts and evidence at trial which only serves to obscure the two basic questions in this case.

I.

The first question is whether hearsay declarations of a co-conspirator allegedly made in furtherance of a conspiracy are admissible in a federal conspiracy trial where such declarations are "unreliable" and "crucial" to the case.

Dutton v. Evans. The Government does not dispute petitioner's assertion that the hearsay declarations were unreliable and crucial but instead argues that the hearsay statements were admissible because there was substantial "independent evidence" of the conspiracy. Simply stated, the Government does not address the question raised in the petition — is the Confrontation Clause of the Sixth Amendment in a federal conspiracy trial coextensive with the federal conspiracy exception to the hearsay rule? Does the Constitution require not only that there be independent evidence of the conspiracy, but also that the declarant be reliable and the statements less than crucial to the case? (400 U.S. at 83-87).

Despite the Government's assertion to the contrary, the only evidence that petitioner joined, knew of, or participated in a conspiracy to defraud is the hearsay declarations of Victor Salerno. For example, after a long description of the laboratory order sheet used by petitioner's clinic the Government makes the following statement:

> *Salerno told* the laboratory supervisor that this was done because petitioner did not want the printed teletype reports to appear on patient's charts in case there was an investigation. (G.Br.4).

When the Government refers to the matter of "sink testing" [throwing samples away and providing the doctor with spurious test results] the Government again makes the following statement:

> *Salerno told* a number of laboratory employees that petitioner was aware of the practice (Tr. 286-287, 313, 373). (G.Br.4)

Suggesting that a medical doctor would condone or permit "sink testing" is of course devastating evidence. Salerno, a fugitive, would make such statements only to shift

responsibility from his shoulders to the petitioners and therefore the declarant is completely unreliable.

The Government makes a presentation of facts in support of the argument that sufficient independent evidence of the conspiracy existed to justify admissibility of the hearsay declarations. If the Sixth Amendment is no broader than the hearsay rule then the existence or non-existence of independent evidence in any given case is not a matter which should be reviewed by this Court except in the most unusual circumstances. However, in *Dutton* this Court suggested that the Confrontation Clause of the Sixth Amendment, even in a federal conspiracy trial, is broader than the hearsay rule and requires not only independent evidence, but also that the declarant be reliable, and that the statements not be devastating to the defendant. This case presents the Court with the opportunity to clarify once and for all the Constitutional limitations, if any, on the admissibility of hearsay declarations in a federal conspiracy trial.

II.

Petitioner was charged with ten counts of mail fraud, but the Court required the Government to select five for trial. The case was submitted to the jury with instructions that, if it decided that it could return a verdict of guilty with respect to any one or more of the five counts, it should return a single verdict without indicating which of the five mailings formed the basis thereof. In other words, the jury did not return a guilty verdict as to any specific count in the indictment. Two of the four substantive counts in the indictment were concerned with billing for tests not performed ("sink testing") and the other two substantive counts concerned billing as individual test procedures for tests performed on a machine. The pertinent HEW regulation, applicable to the "machine" counts reads as follows:

> Physicians or other persons who perform uniform series of tests and examinations or common combinations of procedures may, of course, itemize the individual components of these services on their bills if they wish *and* make separate charges for them. When this occurs a separate reasonable charge determination for each item is necessary (see J.A. V A23-A27) (emphasis added).

The Government ignores the conjunctive language of the regulation "and make separate charges for them" and asserts the regulation concerns only the format of a bill submitted to the Department, not whether payments should be made on an individual basis for tests performed on a machine. The Court of Appeals described the regulation as "confusing" without construing it. Petitioner respectfully submits the Goverment errs in its suggested construction of the regulation and the Court of Appeals erred when describing the regulation as "confusing" without further comment. Petitioner asserts the regulation is plain on its face, authorizes the itemization by individual component of tests performed on a machine and authorizes payment of separate charges for the individual components.

Petitioner's submission of bills to HEW in this manner is no different than a taxpayer who takes accelerated depreciation on his tax return for real estate that is not only *not* depreciating but increasing in value. The taxpayer takes the depreciation because the Government has authorized him to do so and such conduct could not form the basis for a tax fraud charge. Here petitioner followed the HEW regulation when submitting bills for machine tests and his billing procedure is on no different footing than the taxpayer who benefits from regulations which are inconsistent with economic realities.

As evidence of "fraud" the Government refers to a meeting at the home of Dr. DeMeo where petitioner and an

alleged co-conspirator, Victor Salerno discussed using a machine to do laboratory tests. When petitioner learned that Medicare and Medicaid paid the same rate for performing tests on a machine as was paid for performing the tests manually he expressed the sentiment that the policy was a "rip-off". There was no evidence at trial that the term "rip-off" was ever used by petitioner as an expression of his plans or intentions as the Government would have this Court believe. (Compare G.Br.3 with Tr.78, 115-116, 379-380, 596).[1]

Whether or not petitioner believed the HEW policy to be a "rip-off" is totally irrelevant to the question raised in the petition. It is axiomatic that one who does a perfectly lawful act can not be convicted of an offense under the laws of the United States simply because he believes the law *should* be different than it is. Therefore, whatever meaning or connotation is ascribed to the term "rip-off" the fact is the billing procedure used by petitioner was in compliance with HEW regulations and can not as a matter of law form the basis for a charge of mail fraud.

The Government has simply not addressed its Memorandum to those certiorari-related questions.

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[1]The Government similarly distorts the evidence by suggesting that petitioner attempted to conceal his interests in the laboratory from State Medicare investigators. It is clear from the transcript that petitioner, when interviewed by a Medicare investigator, asked the investigator how he had learned that petitioner was a stockholder in the laboratory. The investigator explained that such information was available from the State Corporation Commission and petitioner simply responded to the answer by expressing surprise that such information was a matter of public record. (Compare G. Br.4 with Tr. 419-422).

CONCLUSION

For these additional reasons, the Petition should be granted.

Respectfully submitted,

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June __, 1978